No. 82-1493

IN THE

United States Supreme Court

OCTOBER TERM, 1982

JOHN F. HEALY, *et al.*,
Appellants,

v.

UNITED STATES BREWERS ASSOCIATION, INC. *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR SUMMARY AFFIRMANCE

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Appellees, the United States Brewers Association, Inc., and others, and Anheuser-Busch, Inc., respectfully move this Court for an order summarily affirming the judgment of the United States Court of Appeals for the Second Circuit in this action. The court of appeals held that Sections 30-63a(b), 30-63b(b) and 30-63c(b) of the Connecticut Liquor Control Act (the "price affirmation provisions")[2] constituted impermissible regu-

[1] The Appendix to this motion contains the list required by Supreme Court Rule 28.1 of the appellees and their parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates.

[2] The Connecticut beer price affirmation provisions and price posting statute, Conn. Liquor Control Act § 30-63, are set out in their entirety at pages 3 through 7 of the jurisdictional statement.

lation by the State of Connecticut of the price of beer in the adjoining states of New York, Massachusetts and Rhode Island and thus were invalid under the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3.

Summary affirmance is requested because the decision below is manifestly correct. The court of appeals simply measured the Connecticut statute against the Commerce Clause standard of this Court's recent decision in *Edgar v. Mite Corp.*, 102 S. Ct. 2629 (1982), and earlier precedents and found it wanting. There is no doubt under those decisions that, where one state seeks by statute to control, and indeed set, minimum prices at which goods are sold in other states, that statute is necessarily invalid as an impermissible interference with the freedom of trade and commerce between the states that the Commerce Clause guarantees. The issues that Connecticut raises in questioning that proposition are so insubstantial as not to require full briefing and argument for their disposition.

STATEMENT

The price affirmation provisions were enacted by the Connecticut Legislature in 1981 as additions to extensive regulatory provisions that already governed the beer trade in Connecticut. Under those prior provisions, every brewer must post on the thirteenth of each month the prices at which it will sell its brand or brands of beer, in various kinds of containers, to wholesalers within Connecticut during the succeeding month. Once posted, those prices cannot be changed during the period of the posting. Conn. Liquor Control Act § 30-63 (Jur. St. 5-7).

Under the new price affirmation provisions, at the time of the required posting the brewer must also file a written affirmation under oath that the posted price for a brand and container of beer will not exceed the lowest price for the same brand and container charged to a wholesaler in any state adjoining Connecticut. Conn. Liquor Control Act § 30-63b(b) (Jur. St. 4-5). Section 30-63a(b) (Jur. St. 3) confirms the affirmation requirement by prohibiting the sale of a brand or

container of beer to a Connecticut wholesaler at a price higher than the lowest price in any of the three states adjoining Connecticut—Massachusetts, New York and Rhode Island.

On the complaint of these appellees—who are most of the brewers and importers of beer selling to Connecticut wholesalers—the district court granted summary judgment for the appellant Connecticut officials sustaining the validity of the statute. (Jur. St. 3a-41a.) The court of appeals reversed and directed the entry of judgment for these appellees. (*Id.* at 44a-63a.) The court recognized that the Connecticut statute fixed minimum prices for beer in the three adjoining states and held that this condemned the statute according to Commerce Clause precedents as venerable as *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925), and as recent as last term's *Edgar v. Mite Corp.*, 102 S. Ct. 2629 (1982).

ARGUMENT

It is hard to discern from the jurisdictional statement why the appellant Connecticut officials believe that the court of appeals decided wrongly the question they present to this Court: whether the beer price affirmation provisions "have an impermissible extraterritorial effect in violation of the Commerce Clause . . . ." (Jur. St. i.) They do not challenge the precedents on which the court of appeals relied in giving its affirmative answer to the question or even, in any serious way, the court of appeals' reading of those precedents. The most they do is to complain of some trivial misunderstandings and to offer some quibbling distinctions at the fringes. Thus, our argument in favor of summary affirmance can be quite brief.

POINT I

THE COURT OF APPEALS CORRECTLY HELD THAT THE CONNECTICUT PRICE AFFIRMATION PROVISIONS IMPERMISSIBLY REGULATE COMMERCE OUTSIDE CONNECTICUT

Both the courts below recognized that the new beer price affirmation provisions, taken with the price posting statute on which they were superimposed, regulate and control beer prices offered by brewers to wholesalers in the states of New York, Massachusetts and Rhode Island.

There is no dispute as to how the legislation operates. When brewers post their prices to Connecticut wholesalers for a month on the thirteenth day of the preceding month, they must also affirm, in substance, that during the month covered by the posting they will not charge in any adjoining state a price lower than their corresponding posted price. The posted Connecticut price thus fixes the minimum price for the same brand of beer in the same container in Massachusetts, New York and Rhode Island.

As the district court said:

> [B]ecause it is geared to the future, the Connecticut statute effectively sets minimum prices for the four-state area once the price is posted in Connecticut on the thirteenth of the month. (Jur. St. 36a.)

The court of appeals agreed:

> [T]hese sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers.
>
> * * * * * *
>
> Thus, the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-

Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut. (Jur. St. 60a.)

Indeed, even the appellants have conceded that "[u]ndeniably, a brewer cannot lower its price in a contiguous state during the thirty day posting period in Connecticut." (Jur. St. 20.)[3] Thus, the only issue presented by this appeal is whether such regulation by Connecticut of the prices charged in other states is permissible under this Court's recent holding in *Edgar v. Mite Corp.*, 102 S. Ct. 2629 (1982), and its prior precedents construing the Commerce Clause.

A. *Edgar v. Mite Corp.* and Prior Decisions Invalidating Efforts of States To Reach Beyond Their Borders Establish the Unconstitutionality of the Price Affirmation Provisions

The court of appeals correctly applied well-established precedent in holding that the Connecticut law's regulation and control of persons and conduct outside Connecticut is prohibited by the Commerce Clause. *Edgar v. Mite Corp., supra; Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524, 528 (1935); *Shafer v. Farmers Grain Co., supra*, 268 U.S. at 199.

In *Edgar v. Mite Corp.*, this Court invalidated an attempt by Illinois to regulate tender offers for Illinois corporations or any corporation at least 10 percent of whose equity securities were held by Illinois shareholders. The Court held that the statute, which sought to regulate the conditions under which any such tender offer could be made, not just in Illinois but in all other states, violated the Commerce Clause. Taking note of the traditional Commerce Clause balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), Justice White, speaking at this point for the Court, stated that "[i]nsofar as

[3] Appellants overstate: What is forbidden is to reduce a price in a contiguous state below the corresponding price in Connecticut. That is how the Connecticut statute determines the minimum prices in the adjoining states.

the Illinois Act burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 102 S. Ct. at 2642.[4] As Justice White stated elsewhere in the plurality opinion, the "Commerce Clause . . . permits only *incidental* regulation of interstate commerce by the states; direct regulation is prohibited." *Id.* at 2640.

Edgar v. Mite Corp. is the latest in a long series of rulings by this Court that states may not regulate economic activity outside their borders. Earlier cases were cited in the *Mite Corp.* opinion and by the court of appeals. 102 S. Ct. at 2641; Jur. St. 53a-54a. As early as 1925, the Court held in *Shafer v. Farmers Grain Co., supra,* 268 U.S. at 199, that "a state statute which, by its necessary operation, directly interferes with or burdens . . . [interstate] commerce, is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." Similarly, in *Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. 511, this Court struck down a New York milk pricing regulatory scheme similar to Connecticut's beer pricing legislation. The statute in *Baldwin* required New York milk producers to sign an agreement that if they purchased milk from farmers outside New York they would pay a price no lower than the price charged by New York farmers for similar milk. This Court held that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." 294 U.S. at 521. *See also Southern Pacific Co. v. Arizona, supra,* 325 U.S. at 775.

These cases establish that Connecticut may not regulate the price at which a brewer sells its beer in New York, Massachusetts or Rhode Island. The beer price affirmation provisions constitute such an impermissible regulation.

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[4] In at least one significant respect, the Connecticut statute is even more offensive to Commerce Clause principles than the Illinois statute invalidated in *Edgar v. Mite Corp.* The Illinois statute at least purported to protect non-Illinois shareholders, whom, the Court found, Illinois had no interest in protecting. 102 S. Ct. at 2641-42. In contrast, the Connecticut statute disadvantages non-residents by imposing minimum beer prices in the adjoining states.

B. Connecticut's Arguments for Sustaining the Price Affirmation Provisions in the Face of This Court's Rulings Are Without Merit

Connecticut, as we have said, does not contend that the Commerce Clause cases of this Court relied on below were incorrectly decided, and scarcely even contends that the court of appeals seriously misread the opinions in applying them to the case of the beer price affirmation provisions. Connecticut attempts only to draw some quibbling distinctions[5] between its case and some of this Court's precedents. It argues that this case differs from *Baldwin v. G.A.F. Seelig, Inc., supra,* in that, while the statute there aided in-state milk producers, the Connecticut statute does not help Connecticut breweries because there are none. (Jur. St. 15.) Connecticut also asserts that the brewers, not the state, initially set the price at which they will offer beer in Connecticut. (*Id.*) These factual differences are irrelevant. The beer price affirmation provisions involve the same extraterritorial imposition of price schedules condemned by this Court in *Baldwin.* The lack of Connecticut brewers and the fact that the minimum New York, Massachu-

[5] Appellants also claim, in what they themselves dismiss as "only an alternative or secondary" argument (Jur. St. 12), that this Court should somehow sever § 30-63a(b), which prohibits sales in Connecticut at prices higher than the lowest prices in any of the adjoining states, from the rest of the price affirmation provisions and their preexisting statutory context. (Jur. St. 11-12.) They say that this section, standing alone, does not fix beer prices in other states. But this section does not stand alone. The price affirmation provisions, including § 30-63a(b), *were* enacted together and *were* written into a statutory scheme that included price posting. The price at which a brewer may offer its products at any given time in Connecticut is posted by the brewer on the thirteenth day of the preceding month. Thus, to comply with § 30-63a(b), the brewer must maintain prices in the adjoining states which are higher than the posted Connecticut price throughout the posting period. There has been no hint from the Connecticut Legislature or—until past the eleventh hour—from the appellant state officials that one part of the scheme could be severed from the others and stand by itself. The appellants first made their severance suggestion in asking the court of appeals for a stay pending appeal to this Court. The court denied the motion, and it was not even renewed here.

setts and Rhode Island prices are only enforced and not initially established by Connecticut do not eliminate or even mitigate the extraterritorial reach of the Connecticut statute. The Connecticut statute, like that in *Baldwin*, purports to regulate the price at which goods may be bought or sold in another state.

Appellants' argument (Jur. St. 23) that the brewers remain free to decide whether to sell their products in Connecticut and thereby to subject themselves to the Connecticut pricing regulations is a familiar attempt to dodge the prohibition of the Commerce Clause. That freedom of the brewers does not at all distinguish their case from any relevant Commerce Clause precedent. The offeror in *Edgar v. Mite Corp.* similarly could have avoided the illegal regulation by not making a tender offer for an Illinois corporation, and the milk producer in *Baldwin* could have avoided the New York pricing statute by selling its products outside New York or purchasing all of its milk within the state. The precedents establish that a state may not condition the privilege of doing business in the state on a person's implied consent to the illegal regulation by that state of business transactions which take place in another state.

Appellants also mistakenly argue that the beer price affirmation provisions cause nothing more than a "complication of business judgments" (Jur. St. 16), which is not impermissible under *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). The statute in *Exxon* banned ownership of Maryland service stations by oil refiners and required refiners to extend price reductions offered to any Maryland service station to all other Maryland service stations. Thus, that legislation regulated only *in-state* business activities and prices without reference to out-of-state practices or prices.

Finally, Connecticut cites and refers at a number of points in its jurisdictional statement (pp. 12, 14-15, 16-20, 24) to *Joseph E. Seagram & Sons, Inc. v Hostetter*, 384 U.S. 35 (1966). By such repetition Connecticut would have this Court believe that its decision in *Seagram* that a different New York

liquor price affirmation statute was not unconstitutional on its face somehow bears on this case. But appellants offer no reasoned argument why this is so. In this they are prudent, because the court of appeals pointed out the difference between the New York statute sustained in *Seagram* and the Connecticut legislation:

> [T]he New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state. (Jur. St. 61a.)

The New York statute, in the court's view, did not set prices in other states. Accordingly, the court of appeals correctly held:

> We thus find in *Seagram* no indication that a state is permitted to control the prices at which liquor may be sold in other states . . . . (Jur. St. 62a.)

POINT II

CONNECTICUT'S OUT-OF-STATE REGULATION OF BEER PRICING IS NOT PROTECTED BY THE TWENTY-FIRST AMENDMENT

There can be no question that the Connecticut price affirmation provisions unconstitutionally regulate out-of-state activity. The mere fact that beer, the subject of those statutory provisions, is an alcoholic beverage does not make constitutional extraterritorial regulation that would be unconstitutional if some other commodity were involved. As the court of appeals held, where a state statute does not seek to regulate the importation or distribution of alcohol into that state but rather seeks to regulate the pricing of that commodity in other states, the Twenty-first Amendment provides no protection for the state's venture into extraterritoriality. (Jur. St. 60a.)

The court of appeals, in so holding, was no more than applying the rule this Court laid down in *California Retail*

Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). The Court held that where a state statute is not an exercise of a state's plenary power over the importation of liquor into the state and the system of distribution within the state, but is some other kind of regulation, such as a regulation of pricing, the statute is subject to the balancing of the federal interest in unfettered interstate commerce against whatever legitimate interests the state seeks to advance by the statute. In the present case, it is undisputed, and the courts below have found, that the beer price affirmation provisions do not restrict the importation or distribution of beer into Connecticut. Instead, the Connecticut legislation regulates prices in New York, Massachusetts and Rhode Island. As the court of appeals correctly held:

> Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory. (Jur. St. 60a.)

There is, as in *Edgar v. Mite Corp., supra*, no legitimate interest in extraterritoriality to be balanced against the federal constitutional interest.

CONCLUSION

The question presented by the appellants is not substantial. Connecticut's beer price affirmation provisions operate extra-territorially. Appellants do not deny the fact and scarcely more do they deny the inevitable consequence: invalidation of their state's scheme under the Commerce Clause. The judgment of the court of appeals should be affirmed summarily.

Respectfully submitted,

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June 29, 1983

APPENDIX

Listing Required by Rule 28.1 of Appellees and Their Parent Companies, Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates

Appellee United States Brewers Association, Inc., is comprised of the following member corporations: Anheuser-Busch, Inc.; Christian Schmidt Brewing Company; G. Heileman Brewing Company, Inc.; Latrobe Brewing Company; Pabst Brewing Company; The F. & M. Schaefer Brewing Company; and Jos. Schlitz Brewing Company.

Individual appellees include the following corporations: Anheuser-Busch, Inc.; Champale, Inc.; Miller Brewing Company; Century Importers; Dribeck Importers, Inc.; Guinness-Harp Corporation; Kronenbourg USA, Inc.; Martlett Importing Company; and Van Munching and Company, Inc.

The parent companies, subsidiaries (other than wholly-owned) and affiliates of each member of the United States Brewers Association, Inc., and of each individual corporate appellee are listed below under the name of the related association member or individual appellee:[6]

Anheuser-Busch, Inc.

Parent—Anheuser-Busch Companies, Inc.

Subsidiaries and Affiliates—St. Louis National Baseball Club, Inc.; Busch Properties, Inc.; Consolidated Farms, Inc.; Metal Container Corporation; Kingsmill Realty, Inc.; St. Louis Refrigerator Car Company; Manufacturer's Railway Co.; Manufacturer's Cartage Co.; M.R.S. Redevelopment Corporation; M.R.S. Transport Company; Williamsburg Transport, Inc.; Fairfield Transport, Inc.; Busch Entertainment Corp.; Kingsmill Resorts, Inc.; Container Recovery Corporation; Metal Label Corporation; International Label Company; Busch Creative Services Corporation; Sesame Place, Inc.; Anheuser-Busch International Finance N.V.; Carolina Peanuts of Robersonville, Inc.; Golden Eagle Distributing Co.; Busch Agricultural Resources, Inc.; Busch Industrial Products Corporation; Anheuser-Busch International, Inc.; Anheuser-Busch Europe, Inc.; AB Subsidiary, Inc.

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[6] Based on information provided by the companies.

Christian Schmidt Brewing Company

none

G. Heileman Brewing Company, Inc.

none

Latrobe Brewing Company

none

Pabst Brewing Company

none

The F. & M. Schaefer Brewing Company

Parent—The Stroh Brewery Company

Jos. Schlitz Brewing Company

Parent—The Stroh Brewery Company

Affiliates—La Cruz Del Campo S.A., Henninger Espanola S.A.

Champale, Inc.

Parent—Iroquois Brands, Ltd.

Miller Brewing Company

Parent—Philip Morris, Inc.

Century Importers, Inc.

Parent—Carling O'Keefe, Ltd. of Toronto

Dribeck Importers, Inc.

none

Guiness-Harp Corporation

Parent—Guiness Overseas, Ltd., London, England

Kronenbourg USA, Inc.

Parent—B.S.N., Paris, France

Martlett Importing Co., Inc.

Parent—Molson Breweries of Canada, Ltd., Montreal, Quebec

Van Munching & Co., Inc.

none